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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1051

HARVEY ROSENBERG, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINION BELOW

The Court of Appeals for the Second Circuit did not issue an opinion. The opinion of the United States District Court for the Southern District of New York denying the petitioner's motion to dismiss the indictment, Appendix C, pp. 2a-4a, *infra*, is unreported.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, p. 1a, *infra*) was filed on November 13, 1972, and an order denying a petition for rehearing (Appendix

B, pp. 1a-2a, *infra*) was filed on November 29, 1972. On December 20, 1972, Mr. Justice Marshall granted an order extending the time to file a petition for a writ of certiorari to and including January 29, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant may be charged and convicted of perjury in denying to a grand jury that he had made certain oral statements to Government investigators, where his full testimony before the grand jury demonstrates that he told the grand jury he did not *remember* whether he had made any such statements.

2. Whether this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972), compels dismissal of an indictment for failure to provide a speedy trial where a *six year* lapse between indictment and trial was due principally to what the District Judge found to have been an "inexcusable delay" by the prosecution of more than two years in serving a bill of particulars, and more than three years in complying with other provisions of the Judge's pretrial order.

STATUTE INVOLVED

18 U.S.C. § 1621 provides in relevant part as follows:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material

matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner is an attorney who has practiced law since 1950 in the District of Columbia and its Maryland suburbs. He was convicted by a jury in the United States District Court for the Southern District of New York on a one-count indictment charging him with committing perjury before a grand jury in 1965, and was sentenced to a suspended term of one year's imprisonment. The United States Court of Appeals for the Second Circuit (Smith, Kaufman, and Mulligan, JJ.) affirmed without opinion.

The events giving rise to the petitioner's indictment began in July 1964, when he represented one Arnold Romano, who had been arrested in the District of Columbia on a federal narcotics charge. After a bail hearing before a United States Commissioner in the District of Columbia, petitioner deposited $30,000 with a bondsman in the District of Columbia, and Romano was released on bond.

Romano was subsequently indicted in the Southern District of New York and was ordered removed after another United States Commissioner's hearing at which petitioner represented him. On April 27, 1965, when a calendar call on the case was set in the Southern District of New York, Romano did not appear. An investigation was begun by the Bureau of Narcotics, and pursuant to that investigation two Narcotics agents communicated with an acquaintance of Ro-

mano's named Muriel Block. Miss Block agreed to be interviewed at the offices of the petitioner, who was her attorney.

The interview was held on April 30, 1965. In a report of the interview dated May 6, 1965, one of the agents stated that he had asked petitioner some questions on concluding the interview with Miss Block. The questions pertained to petitioner's receipt of the $30,000 used as security for Romano's bond, and, according to the agent, petitioner responded by telling the agent that the money had come to him after a telephone conversation with Romano's New York attorney.

On May 18, 1965, petitioner appeared pursuant to invitation before the federal grand jury in the Southern District of New York and was asked about his services for Romano and his receipt of the $30,000. (He was *not* asked on this occasion—or on the next five appearances he made before the grand jury—about the statements he allegedly made to the Narcotics agents, even though the prosecutor had the Narcotics agents' report of May 6 in his possession.) Petitioner invoked the attorney-client privilege in response to many questions relating to the $30,000. Five grand jury sessions ensued over the following month-and-a-half, during some of which the Hon. John M. Cannella, U.S.D.J., presided over the questioning of petitioner before the grand jury in the presence of several Assistant United States Attorneys (with petitioner's counsel excluded). On July 14, 1965, his seventh appearance before the grand jury (at the 270th transcribed page of his grand jury testimony), petitioner was asked, for the first time, about the interview conducted by the

Narcotics agents. The first question and answer on the subject was:

> Q. Did the agents discuss with you on this occasion the thirty-thousand-dollar bond that was posted.
> A. I don't recall whether they did or not.

Shortly thereafter, petitioner was again asked:

> Q. Do you recall whether, in the conversation between the agents and Miss Block, the subject of the thirty thousand dollars came up?
> A. No, I don't. I really don't.
> Q. You don't recall that.
> A. [Shakes his head]
>
> * * * * * * *
>
> Q. Did the agents, do you recall, ask you about the thirty thousand dollars?
> A. I don't recall Mr. Tend—Mr. Obermaier—I really don't . . . .

Despite petitioner's unqualified statements that he did not remember any conversation with the two agents concerning the $30,000 that he had posted for Romano, questions were repeatedly directed to him concerning such a conversation. Petitioner's answers to five of those questions became the subject of his indictment. Excerpts from that questioning are as follows (the questions and answers quoted in petitioner's indictment are in italics):[1]

> Q. Did you tell the agents that you had no personal knowledge of the thirty-thousand dollars?
> A. I don't think they asked me any questions

[1] The entire series of questions and answers on this subject, which occupies fifteen pages of the grand jury transcript, is reproduced in Appendix D *infra*, at pp. 5a-15a.

about the thirty-thousand dollars. I don't remember any.

* * * * * * *

Q. But you have no present recollection?

A. No, because they didn't come to talk to me, and my whole reason for being there was to assist Miss Block . . . .

* * * * * * *

Q. And you recall nothing in the conversation between Wurms and yourself, concerning the thirty-thousand dollars?

A. No, sir. I really don't.

* * * * * * *

Q. But the agents asked you nothing about the $30,000?

A. Not to my recollection, they didn't. They didn't come to talk to me. They came to talk to Miss Block.

Q. That's not what I'm asking you.

A. I don't recall anything about the $30,000 ever being asked me.

* * * * * * *

Q. Did you tell Agent Wurms that you received a telephone call from Markowitz concerning the $30,000?

A. I don't recall any such conversation.

Q. Well, would such a conversation have been had between you and Wurms, that you—

A. I doubt it.

Q. You know you had no personal knowledge as to how you obtained the $30,000?

A. That's right, sir.

Q. *Didn't you tell Agent Wurms that Markowitz, during the telephone conversation, tola you that he was sending down $30,000 by messenger?*

A. *No, because that's not what happened.*

Q. You didn't tell the agent that?

A. [Shakes head, no.]

Q. Is there any doubt in your mind that you had no such conversation, even approaching that subject?

A. I don't recall any such conversation, Mr. Obermaier. Anything would be possible, but that did not happen. Mr. Markowitz did not, to my knowledge, and even to my present knowledge,—well, now,—you're getting—

Q. Well, did you tell the agents that Markowitz called you?

A. Did I tell the agents Markowitz called me?

Q. And told you that he was sending down $30,000 in cash?

A. I don't think so. I don't know. I don't recall any such conversation.

* * * * * * *

Q. Did you talk to Romano about the receipt of the $30,000?

A. Did I? I think that's privileged communication.

Q. Did you talk to the agents about that?

A. Not to my knowledge. I wouldn't tell them anything that's privileged.

* * * * * * *

Q. Well, you certainly weren't acting in an attorney's capacity with respect to the $30,000.

A. Well, look, first of all the facts are, when I got the $30,000, I called the bonding company and I got Mr. Romano out, so I certainly wouldn't have gone down to the jail with the $30,000.

Q. That's not my question; not even close to my question. I asked, did you go down to Romano with respect to a receipt for $30,000?

A. No, sir.

Q. *Did you tell the agents that you went down to the District jail to talk to Romano about a receipt for $30,000?*

A. *Not to my knowledge, because it never occurred—*

Q. Did you tell the agents that Romano told you that you should sign the receipt for the $30,000 and give it to Senge?

A. No, sir, because I wouldn't be signing a receipt for $30,000 I gave away.

* * * * * * *

Q. Did you tell the agents that you signed a receipt for the $30,000?

A. No, sir.

Q. Did you tell the agents that you could produce that receipt, if it was necessary?

A. No, sir; there is no such receipt.

* * * * * * *

Q. You didn't tell the agents that you signed a receipt for the $30,000?

A. You know,—I don't know what the agents have said, but I did not discuss this matter with the agents.

Q. At all?

A. No; my recollection, no. And I could not have told them there was a receipt, because there is no receipt.

Q. And you could not have told them that you went down to Romano in the District jail, to discuss the $30,000 receipt, did you?

A. No, sir, because I got Mr. Romano out within six hours of having received the money. I didn't go to the jail.

* * * * * * *

Q. Did you tell Agent Wurms that you had such a conversation?

A. I have no recollection about a conversation with Agent Wurms about the $30,000. I have absolutely no recollection about it at all because the only reason he was in my office was to talk to Miss Block.

Q. You have no recollection that you had this conversation?

A. My testimony is I have no recollection of it whatsoever.

On January 20, 1966, petitioner was charged with perjury by the same grand jury before which he had testified, in a two-count indictment filed in the Southern District of New York.[2] The first of the two counts quoted testimony given by him to the grand jury on five dates in which petitioner had denied knowledge of the source of the $30,000 used as collateral. The second count related to the testimony quoted above concerning his discussion with Narcotics agents.

A motion was filed by the petitioner to dismiss the indictment on the ground, *inter alia,* that the participation of a District Judge in the grand jury proceeding violated his right not to have unauthorized persons in the grand jury room. On October 27, 1966, while that motion was pending and after it had been argued, the present superseding indictment in one count was filed by another grand jury. This indictment charged *only* that petitioner had lied in answering the five questions italicized above and omitted all the questions and answers which preceded and followed the five selected. The prosecution filed a *nolle prosequi* on the earlier two-count indictment.

Motions to dismiss and for discovery were filed by the petitioner a little more than two months after the indictment was entered. On June 1, 1967, the Hon. Irving Ben Cooper, U.S.D.J., filed a Memorandum Opinion denying the motion to dismiss and granting a request for certain particulars and other discovery. By March 20, 1968—almost ten months after Judge

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[2] The Narcotics agents—whose version of the conversation with petitioner is said to have been material to the grand jury's investigation—did not testify before the grand jury until January 20, 1966. Obviously, the only purpose of their testimony was to indict petitioner.

Cooper's order—no bill of particulars had been served by the prosecution and it had failed to make the discovery required by the Judge's order. Petitioner's counsel thereupon moved for dismissal of the indictment. The motion was thereafter adjourned by stipulation, but petitioner's counsel, in the letter agreeing to the first adjournment, specified that the government was to "give us information required by Judge Cooper within thirty days" (A. 238).[3]

On July 8, 1969,—25 months after Judge Cooper's order—the prosecution served a two-and-one-half page bill of particulars. The other two discovery instructions were still not complied with, and on October 26, 1970, petitioner's counsel again moved to dismiss the indictment for want of a speedy trial. In reply, the government submitted an affidavit of an Assistant United States Attorney who stated that he had been assigned the case in *August 1970,* and that there had been no undue delay on his part.

Judge Cooper denied the motion to dismiss on February 8, 1971, although he found (pp. 2a-3a, *infra*) that the prosecution was guilty of "a clear failure within a reasonable time to comply with our order of June 1, 1967." He added: "[W]e are at a loss to understand the inordinate time it permitted to pass; even at this late hour it offers no satisfactory reason." He also concluded that there was "inexcusable delay on the Government's part," but believed that certain limited additional discovery and the setting of a trial date for the fall of 1971 sufficed to overcome this failing.

Prior to trial—which began on January 25, 1972—petitioner's attorney filed another motion to dismiss

[3] "A." refers to the Appendix filed with the Court of Appeals.

the indictment because he had been denied a speedy trial. That motion was denied without opinion.

The government's proof at trial consisted almost entirely of the testimony of the two Narcotics agents.[4] Both agents testified that they had come to petitioner's office on April 30, 1965, to interview Miss Muriel Block, and that at the conclusion of Miss Block's interview, Agent Ivan Wurms asked petitioner about the $30,000 collateral used to obtain Romano's bond. According to the agents—who were testifying about conversations that had occurred almost seven years before the trial—petitioner told them that he had received a telephone call from David Markowitz, Romano's New York lawyer, advising that $30,000 would be delivered by messenger, and that the $30,000 had thereafter come by an unknown messenger. According to the agents, petitioner said he took the $30,000 to Romano at the District of Columbia jail and was told to sign a receipt and to give the money to the bondsman. The agents also said that petitioner told them he had a receipt and could produce it if necessary.

Petitioner testified in his own defense and presented several reputation witnesses. His testimony was, in essence, that he had tried to convey to the grand jury

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[4] The prosecution also called the deputy forelady of the grand jury before which Rosenberg had testified, and David Markowitz, the lawyer who, according to the agents' report of their conversation with Rosenberg, was said by Rosenberg to have called him and told him that the $30,000 was being sent to Washington by messenger. Markowitz denied ever having had such a conversation with Rosenberg. (This testimony was, of course, consistent with Rosenberg's testimony to the grand jury and with the substance of his first allegedly perjurious answer—*i.e.*, that he would not have told the agents about Markowitz' phone call because the conversation never took place.)

"at least sixteen times that I had no recollection of any conversation concerning the $30,000 with the agents" and that the answers specified in the indictment were meant to explain why he believed that he would not have made such statements to the agents.

After four days of trial and some eight hours of deliberations, the jury reported that an impasse had been reached.[5] The jury was dismissed for the weekend, and resumed deliberations on Monday morning after receiving what the District Judge referred to as a "mild Allen charge." At 5:20 p.m., the jury returned a guilty verdict.

REASONS FOR GRANTING THE WRIT

This Court recently had occasion to review and reverse a decision of the Court of Appeals for the Second Circuit which had overbroadly applied the federal perjury statute, 18 U.S.C. § 1621. In *Bronston* v. *United States,* No. 71-1011 (decided January 10, 1973), a unanimous Court, relying upon authorities as disparate as Dean Wigmore and Montesquieu, concluded "that the perjury statute is not to be loosely construed." The Court of Appeals for the Second Circuit had, however, summarily affirmed petitioner's conviction before its "loose construction" of Section 1621 was overturned by this Court. And the facts of this case—spelled out in detail in our Statement and disclosed by even a casual reading of petitioner's full grand jury testimony—support a criminal conviction only on an expansive

[5] The jury inquired, at one point in its deliberations, whether it had to find that petitioner lied in all five answers to enter a guilty verdict. The judge replied that falsity "with respect to any one of his answers" would be sufficient, without also instructing that the jury would have to agree unanimously that the particular answer was false.

view of the perjury statute. This Court should grant certiorari and either reverse the judgment below on the authority of *Bronston* v. *United States,* or, at the least, remand this case for further and fuller consideration.

1. As the portions of petitioner's grand jury testimony quoted in our Statement plainly reveal, the indictment lifted certain of his answers out of context to make it appear that he unqualifiedly *denied* making certain statements, whereas in fact his testimony was that he *did not remember* making any such statements. The prosecution neither charged nor proved that petitioner *did* remember making those statements; it proved at the most only that the statements *were made.*[6]

The rule is well established that " a charge of perjury may not be sustained by the device of lifting a statement out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows." *Fotie* v. *United States,* 137 F.2d 831, 842 (8th Cir. 1943). Accord, *Van Liew* v. *United States,* 321 F.2d 674, 677-678 (5th Cir. 1963). Yet the Court of Appeals for the Second Circuit, by its decision in this case, and a divided Court of Appeals for the Ninth Circuit, by its very recent decision in *United States* v. *Cook,* 468 F.2d 1164 (1972), have emasculated this salutary rule by holding that issues of the true meaning of the questions and answers quoted in the indictment are for the jury, and "all the reasonable inferences supporting the verdict are in favor of the government." *Id.* at 1168, 1170.

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[6] On this point, see *Fotie* v. *United States,* 137 F.2d 831, 842 (8th Cir. 1943), holding that where a defendant is charged with perjury in testifying that he *did not remember,* "something more is necessary to convict than proof that the act, not remembered, did in fact occur."

The decision below, as well as the Ninth Circuit's recent ruling in the *Cook* case—to which Judge Ely vigorously dissented (see 468 F.2d at 1176-1178)—conflict with the rule in the Eighth Circuit, as applied in *Brown* v. *United States*, 245 F.2d 549 (8th Cir. 1957). In the present case, as in *Brown*, the events which preceded the alleged perjurer's crucial appearance before the grand jury—*i.e.*, the fact that he had been called on six different occasions over a period of less than two months and never once asked about his conversation with the Narcotics agents—demonstrated that the sole purpose of calling him to ask more questions was to ensnare him in a perjury charge. And the relentless series of questions that followed his repeated assertions that he did not remember the contents of his conversations with the Narcotics agents amounted to "bludgeoning" for the purpose of finally evoking an answer on which a perjury charge might be filed. In this case, as in *Brown*, the prosecutor's "purpose was simply to extract from defendant his testimony about the talk . . . knowing that his recollection of it differed from that of the others present, and to get him indicted for perjury." 245 F.2d at 555. And, as in *Brown*, "[t]he questions and answers in the indictment are taken out of context," because this petitioner, like the defendant in *Brown*, "made it plain in other answers that he had no distinct recollection of actual words used in the discussion" (which, like that in *Brown*, was a conversation in which his attention was directed to subjects other than his own statements). *Ibid.*

These are substantial reasons of policy to limit perjury prosecutions of this kind. In the first place, to sustain a conviction under these circumstances encourages misuse of a grand jury, and "bludgeoning" of a witness, by the technique of "repeating and rephrasing

the same question, thus creating more possible perjury counts," and "enabling the prosecution to choose the most detrimental responses to identical questions as the bases for a charge of perjury." *United States* v. *Cook, supra,* 468 F.2d at 1176, 1177 (Ely, J., dissenting); see *Gebhard* v. *United States,* 422 F.2d 281, 289-290 (9th Cir. 1970).

In the second place, a permissive rule leaving all such questions to the jury permits convictions to be based on charges neither pleaded nor proven. The danger is well illustrated in this case. For while petitioner was concededly neither charged with nor proved guilty of lying when he said he did not remember, the prosecutor and the trial judge nevertheless asked the jury to consider this issue. In his summation, the prosecutor stated (Tr. 363-364):

> " 'I don't remember' isn't a tricky phrase, it is a very simple phrase. If a man says 'I don't know' and he doesn't remember, that is the truth.
>
> "If a man says, 'I don't remember,' and he does remember, that is a lie."

And in his charge to the jury, the trial judge also said (Tr. 405):

> "And so, to say 'no' under oath when the sworn witness knows full well that the truth calls for 'yes,' or vice versa, is perjury. As to 'I don't remember,' that is equally false if the witness actually knows that the truth calls for a certain answer."

These admonitions could only have confused the jury into believing that it could convict if it found petitioner's answers not charged in the indictment to have been false; yet petitioner was not defending against any such charge.

2. In upholding the District Court's denial of petitioner's motion to dismiss the indictment on the ground that he had been denied a speedy trial, the Court of Appeals misapplied this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972), in such a way as to call for the exercise of this Court's supervisory power.

Six full years elapsed between the date of the indictment and petitioner's trial, a year longer than the delay which this Court in *Barker* termed "extraordinary." 407 U.S. at 533. The delay substantially prejudiced the petitioner because the government's case turned largely on what the Narcotics agents could recall of their conversation with the petitioner in April 1965. Their testimony established that they had no substantial present recollection, but that they relied on a report that they had written in May 1965 and on grand jury testimony given when the appellant was indicted. Appellant was not convicted, therefore, on present recollection but on documents and old testimony not subject to cross-examination.[7]

Furthermore, petitioner clearly did not "waive" the right to a speedy trial. He moved to dismiss the indict-

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[7] The prosecutor in summation used the delay to his advantage in attempting to rehabilitate his witness's testimony (Tr. 370):

> "He came up to testify about the last page of that report, he knew what he was talking about. The other stuff, the first six pages, is part of a dead investigation that covered three days, some six years ago.
>
> • • • • •
>
> "Mr. Amster did a very good job of cross-examining him, and I want to compliment him on that. He showed he didn't remember all those irrelevant things about the three days. It doesn't help, doesn't help the defendant a bit. It shows he doesn't remember anything that is not important, that he has not bothered with over the six years."

ment (the equivalent of a request for speedy trial) almost four years before trial, and renewed the motion in October 1970—still more than a year prior to trial.

Under these circumstances, the Court of Appeals could have rejected petitioner's claim under the "balancing test" of *Baker* v. *Wingo, supra,* only by finding that the delay was for some reason "justifiable." But the record reveals that the greater part of the six years' delay was attributable to a single unjustifiable default by the government—its failure, over a period of four years, to comply with an order by the trial court directing that certain discovery be provided to the petitioner. Not until July 1969 did the prosecution furnish the bill of particulars called for by the court's order of June 1, 1967, and the other two items were not furnished until December 2, 1970—after the defense had moved to dismiss the indictment for denial of a speedy trial, and three and one-half *years* after the discovery order was entered.

In ruling on petitioner's motion to dismiss the indictment, the District Judge was "at a loss to understand the inordinate time [the government] permitted to pass," and concluded that the government's delay was "inexcusable" (Appendix C, pp. 2a-4a, *infra*). Nevertheless, the judge denied the motion without discussion, apparently believing that setting a fall 1971 trial date and ordering certain additional discovery was an adequate remedy for the delay in bringing the case to trial. This was clearly error; for "the only possible remedy" that will vindicate a defendant's right to a speedy trial is dismissal of the indictment. *Barker* v. *Wingo, supra,* 407 U.S. at 522.

We know of no federal case in which a delay of six years between indictment and trial has been held pro-

per under the Sixth Amendment. In this case there are the additional facts that the petitioner was convicted largely on the basis of a six-year old report of a government agent as to which he had little independent recollection at the time of trial, and that much of the delay is attributable to "inexcusable" conduct by the government. Under these circumstances, if the "balancing test" of *Barker* v. *Wingo* is to prove an effective guarantee of the right to a speedy trial, we submit that it must compel reversal of the decision of the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

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